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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1974
No. 74-386

STATE OF IDAHO,
STATE TAX COMMISSION,
Petitioner,
vs.
MARGARET ROSE MAHONEY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

W. ANTHONY PARK
Attorney General
State of Idaho

WILLIAM McDOUGALL
Asst. Attorney General

ROBERT L. MILLER
Chief Deputy Attorney General
P.O. Box 36
Boise, Idaho 83722

Counsel for Petitioner

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MARGARET ROSE MAHONEY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Petitioner respectfully prays that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of Idaho, entered herein on July 8, 1974, reaffirming the Idaho Supreme Court's Decision in John George Mahoney, Plaintiff, Margaret Rose Mahoney, Plaintiff-Respondent v. State of Idaho, State Tax Commission, Defendant-Appellant, 524 P. 2d 187, *infra*, App. II.

OPINION BELOW

The final Order of the Court below on the Petition for Rehearing reaffirmed Mahoney, supra, *infra*, App. I.

JURISDICTION

The final order of the Idaho Supreme Court was made and entered on July 8, 1974, and is appended hereto, *infra*, App. I. The full opinion of the Court below, which is the opinion sought to be reviewed, was filed on September 5, 1973, *infra*, App. II. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Does the imposition of the Idaho tax on retail sale of cigarettes on sales between a private Indian operated business enterprise on the Coeur d'Alene Indian Reservation and passing non-Indian motorists:

1. Constitute an unwarranted extension of state-taxing authority over the Coeur d'Alene Indians in violation of this Court's recent decision that state income taxes could not apply to Navajo Indians on the Navajo Reservation (*McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164)?

2. Constitute an infringement upon any alleged federal right of the Coeur d'Alene Tribe to self government?

3. Violate U.S. Const. Art, 1 §8 (The Commerce Clause) as an unreasonable or unwarranted state interference or burden on Indian commerce?

4. Violate 4 U.S.C. §§105-110 (The Buck Act)?

5. Otherwise attempt to impose state taxes on Indians in violation of federal law?

CITATIONS

The case involves the following provisions of the United States Constitution:

1. "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform through the United States; . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ." *U.S. Const.*, Art 1 §8.

2. "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and counsels, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, and the courts of law, or in the heads of departments." *U.S. Const.* Art. 2, §2, Cl. 2.

The case involves the following provisions of the Constitution of the State of Idaho and the Organic Act of the Territory of Idaho:

1. "§19. Religious freedom guaranteed-Disclaimer of title to Indian lands.-It is ordained by the State of Idaho that perfect toleration of religious sentiment shall be secured, and no inhabitant of such state shall ever be molested in person or property on account of his or her mode of religious worship. And the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within the said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States, residing without the said State of Idaho, shall never be taxed at a higher rate than the lands belonging to the residents thereof. That no taxes shall be imposed by the state on the lands or property therein belonging to, or which hereafter be purchased by, the United States, or reserved for its use. And the debts and liabilities of this territory shall be assumed and paid by the state of Idaho. That this ordinance shall be irrevocable, without the consent of the United States and the people of the State of Idaho." *ID Const.* Art. 21, §19.

2. "Sec. 1. Territory of Idaho - Boundaries - Construction of Act.—all that part of the territory of the United States included within the following limits,

to wit: beginning at a point in the middle channel of the Snake River where the northern boundary of Oregon intersects the same; then follow down the said channel of Snake River to a point opposite the forty-ninth parallel of latitude; thence east along said parallel to the twenty-seventh degree of longitude west of Washington; thence south along said degree of longitude to the northern boundary of Colorado territory; thence west along said boundary to the thirty-third degree of longitude west of Washington; thence north along said degree to the forty-second parallel of latitude; thence west along said parallel to the eastern boundary of the State of Oregon; thence north along said boundary to the place of beginning. And the same is hereby created into a temporary government, by the name of the territory of Idaho: provided, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing said territory or changing its boundaries in such manner and at such time as Congress shall deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States: provided, further, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such right shall remain inextinguished by treaty between the United States and such Indians, or include any territory, which, by treaty with the Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such

territory shall be excepted out of the boundaries and constitute no part of the territory of Idaho, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States, to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never been passed." *Idaho Organic Act. §1.*

The case involves the following provisions of the United States Code:

1. 4 U.S.C. §§105 through 110 and more particularly 4 U.S.C. §§109 and 110 (e), *infra*, App. VII.

2. 15 U.S.C. 375-378 *infra* App. VII.

The case involves the following provisions of the *Idaho Code:*

1. §9-101(8), Idaho Code, *infra*, App. IX.

2. §63-2501, as enacted in 1945, *infra*, App. IX.

3. §63-2503, Idaho Code, as amended in 1972, *infra*, App. IX.

4. §63-2508, Idaho Code, as enacted in 1945, *infra*, App. IX.

STATEMENT OF THE CASE

John George Mahoney, a member of the Coeur d' Alene Indian Tribe and the original Plaintiff in this

action, engaged in a business consistng of the retail sale of cigarettes. The business was located in northern Idaho and was adjacent to U.S. Highway 95, which is the major North-South Highway in northern Idaho, and which bears a large volume of daily traffic. Respondent's customers consisted of passing motorists, and the business enterprise made a substantial portion of its sales to non-Indian members of the general public. The business enterprise was located on allotted trust land within the interior boundaries of the Coeur d'Alene Indian Reservation.

Petitioner insisted that Respondent affix stamps evidencing compliance with the Idaho Cigarette Tax Act imposed by §63-2503, *Idaho Code*. At the time this action arose, the tax was imposed at the rate of 7/20ths of one cent per cigarette or seven cents for a standard package of twenty cigarettes. The tax was subsequently amended to the present rate of 9/20ths of one cent per cigarette. *Session Laws* of 1972, Ch. 275 Pg. 666, (App. IX.)

Petitioner insisted that the state cigarette tax imposed by §63-2503, *Idaho Code*, be complied with only as to cigarettes sold to non-members of the Coeur d' Alene Tribe; Petitioner has not contended that sales to tribal members are taxable under the state cigarette tax. The state cigarette tax is imposed on "the retail sale of cigarette".

The cigarettes held for sale by Respondent were obtained by Respondent personally in the State of Washington and imported into the State of Idaho

directly into the Coeur d'Alene Indian Reservation without passing through any part of Idaho not within the Coeur d'Alene Reservation.

After Petitioner's attempt to obtain compliance with the state cigarette tax was unsuccessful, Petitioner levied on Respondent's stock of goods. After this action was instituted for recovery of the goods, the goods were sold pursuant to stipulation of the parties. The issues presented to the Courts below consist solely of the applicability of the state cigarette tax to the cigarettes held for sale to non-Indian customers, and no issue was presented concerning the power of the State Tax Commission to seize the cigarettes in question if they were in fact taxable under the state tax.

Unlike Reservations frequently dealt with by this Court, the Coeur d'Alene Reservation contains substantial lands within its exterior boundaries that are in private, non-Indian ownership. Many of the persons residing on the Reservation are not members of the Tribe, and the Reservation contains several of the larger communities in Northern Idaho. Land ownership is "checkerboarded" with interspersed parcels of land in private and Indian or federal ownership.

There was no Coeur d'Alene tribal interest in Respondent's business enterprise; it was stipulated that Respondent was conducting a private business enterprise, and was not performing a tribal function.

Pending trial, the present Respondent was sub-

stituted as Plaintiff; it is undisputed that she succeeds to the original Plaintiff's rights in this action.

The State trial Court in a Memorandum Decision and Judgment attached as Appendix IV held that the Idaho Cigarette Tax Act did not apply to cigarettes held on the Coeur d'Alene Reservation for sale to non-Indian customers, in the absence of a statute specifically authorizing taxation of the cigarettes by the State. The Idaho Supreme Court in the Decision attached as Appendix II affirmed the trial Court's decision, two Justices dissenting.

The question of John George Mahoney's immunity from state cigarette taxation was first raised in his Complaint by an allegation that "the state tax commission has no jurisdiction over commerce on Indian trust land and had no right to go thereon and seize cigarettes". Complaint, Paragraph IV, *infra*, App. III. The Court in the first instance disposed of the question by concluding as a matter of law as follows:

> "The 784 cartons of cigarettes which are the subject matter of this action and sales thereof by plaintiffs on trust lands within the Coeur d'Alene Indian Reservation were not subject to the excise taxes of the State of Idaho". *Amended Findings of Fact and Conclusions of Law, infra*, App. V.

The Idaho Supreme Court determined,

> "that the principles enunciated in *McClanahan* are applicable in cases such as this involving a state's attempt to tax

non-reservation sales consumated by Indian sellers, even though *McClanahan* itself involved the state's attempt to tax personal income earned by an Indian solely from reservation sources". *Mahoney v. State Tax Commission*, 524 P.2d 187, *infra*, App.II.

The Court further determined as follows:

> "In the case before us today, the incidence of the tax falls squarely upon sales by an Indian on a reservation; this tax is nothing less than a direct tax upon commerce with the Indian tribes, and 'such taxation is not permissible absent congressional consent'." *Mahoney*, supra, p. 192, *infra*, App. II.

And finally, the Court concluded as follows:

> "In the absence of congressional consent, the Idaho State Tax Commission had no jurisdiction to tax the on-reservation sale of cigarettes by an Indian seller, whether the purchasers were Indians or non-Indians. U.S. Const. Art. 1, Sec. 8, Cl. 3. Where, as here, Congress has manifested its intent to deny the states the power to collect such a tax it is irrevelant that its imposition would not infringe upon tribal self-government. *McClanahan v. State Tax Commission of Arizona*, supra. The decision of the District Court is correct and accordingly must be affirmed." *Mahoney*, supra, p. 195, *infra*, App. II.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to provide guidance and direction to Petitioner and other States in the

unresolved conflicts over the effect of the previous decisions of this Court on the obligation of Indian citizens to participate in state taxing programs when they engage in commerce with non-Indians. Throughout the history of our Nation, no matter has exhibited so much potential destructiveness as distinctions between citizens based upon national background or race. A long series of decisions of this Court, culminating in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, adequately demonstrates that as an Indian Respondent is entitled to certain additional "rights" or immunities from state taxation not enjoyed by non-Indian state citizens. As state tax administrators, Petitioner must deal with the potentially explosive difficulties inherent in the right of Respondent and other Indian people, to avoid payment of state taxes because of their race or national origin, and at the same time accommodate both state revenue needs and a reasonable insistence by non-Indian state citizens that any exemption or immunity for Indian citizens go no further than required by appropriate federal law. A long series of decisions by this Court provide reasonable guidance in areas in which an Indian citizen has not engaged in business activities substantially involving non-Indian citizens, or not otherwise interfering with questions involving substantial state interests. In the *Warren Trading Post v. Arizona Tax Comm.* 380 *U.S.* 685, 14 L.Ed.2d, 165, 85 S.Ct. 1242, case, for example, this Court was presented with an issue involving a sales tax on a sale occurring on the Navajo Reservation and which was made to a Navajo Indian. The Court, however, expressly disclaimed any statement on

what might be the result had the sale been made to a non-Indian. In the recent case of *McClanahan*, supra, the Court again spoke only to problems involved in an income tax on the individual Indian himself.

The decision of the Idaho Supreme Court has effectively prevented imposition of the Idaho cigarette tax act on cigarettes sold on the Coeur d'Alene Indian Reservation. The direct effect of this, as the Court itself noted, is to give merchants on the Coeur d'Alene Reservation a ninety cents per carton competitive advantage over persons not entitled to the immunity rule announced by the Idaho Supreme Court. The disrupted impact of such a situation on relations between Indian and non-Indian citizens of the state is severe; the problem is particularly distressing in the present situation in which there has been no definitive ruling of this Court on the matter, and in which as outlined in this Petition, similar treatment is not effectively given between Indian and non-Indian citizens of other states.

2. In the last term of this Court, the case of *Tonasket v. State*, 488 P. 2d 281 Wash. 1971 (Petition for Cert pending, Docket 71-1031) involved issues in part substantially identical with the question presented by this Petition for Certiorari. This Court, recognizing both the substantiality of the issues and the need for a thoughtful and thorough consideration of them, remanded to the Washington Supreme Court the *Tonasket* case. The remand was issued so that the Washington Supreme Court might more fully consider the effect of 67 Statutes at Large, p. 589.

While the Idaho Supreme Court in the present case

assumed that the Navajo and Coeur d'Alene Reservations were identical, and that the Arizona income tax dealt with in the *McClanahan* case could be equated with the Idaho cigarette tax, the analogies are simply inaccurate. First, the Navajo Reservation, which is an autonomous and viable self-government entity with a long history of internal autonomy and self-control cannot be equated with the Coeur d'Alene Reservation. The Coeur d'Alene Reservation has neither a long history of viable and independent self-government nor does the Coeur d'Alene Reservation consist almost entirely of lands still held by the federal government in trust for Indian people, or the Indian people themselves. Finally, and most importantly, individuals on the Coeur d'Alene Reservation are an integral part of the larger social and economic community of Idaho, whether or not they happen to be Indian citizens. In such a situation, the individuals have responsibilities not only to their tribe but also to the state; while properly they might well not contribute to the economic sustenance of the state, they have a basic obligation not to use a personal immunity based upon their historical origin to effectively destroy competing non-Indian owned enterprises. In short, while they may avoid taxes in fact imposed upon and borne by Indian people, they should not be allowed to avoid participation on state taxing programs where the burden of such taxes is not borne by the Indian people but non-Indians customers.

Secondly, Petitioner cannot believe the *McClanahan* decision was intended by this Court to apply to in-

stances involving matters substantially affecting legitimate state interest. The Idaho Supreme Court failed to recognize substantial legal and practical effects of the differences between an income tax, such as dealt with by this Court in *McClanahan,* and a tax on a transaction, the retail of cigarettes. An income tax, by its nature, is a tax on an individual. The ability of a state to levy such tax must depend directly upon the ability of the state to tax the individual himself. In addition, exemption from such a tax does not grant the individual a special commercial advantage not enjoyed by any other merchant. Finally, the advantage of such an exemption cannot be "bartered" to a non-Indian customer through the sale of untaxed goods. None of these things are true of a tax on a transaction in which a non-Indian purchases goods from an Indian. By voluntarily engaging in commercial transactions in which goods are sold to non-Indians, the seller has himself voluntarily entered into matters involving substantial state interest; he does not take this critical step merely through the earning of income on a reservation as was done in the *McClanahan* fact setting.

This Court carefully limited its decision to the particular taxes presented. Thus, in *Mescalero,* the Court interpreted the *McClanahan* decision, supra, as carefully limited to taxes on Indian *income,* or Indian *lands.* The issues presented to the Idaho Supreme Court have not previously been determined by this Court; they certainly differ substantially from those presented in *McClanahan.*

Finally, the Idaho Supreme Court's reliance upon

either the Commercial Clause or 40 U.S.C. §§105-110 (The Buck Act) is completely unprecedented. No modern decision of this Court has attempted to apply principles derived from interstate or foreign commerce to the area of state taxation of reservation Indians. If such a new and novel approach is to be adopted, it should be considered by this Court because of its far reaching implications. While it has been frequently suggested that the basic source of federal power over commerce with Indians as well as Indian tribes stems from the Commerce Clause, the Idaho Supreme Court went far beyond this assumption and attempted to apply directly principles derived from rules governing interstate commerce which is completely unprecedented and which this Court has not attempted to do in the past.

3. The recent cluster of decisions from State and lower federal Courts attempting to deal with the acute state tax problems presented by transactions between Indians and non-Indians has only accentuated the confusion and disarray in an area which cries for leadership and direction from this Court. The course of *Tonasket v. State*, 488 P. 2d 281 Wash. 1971 (Petition for Cert. pending, Docket 71-1031) through the Washington Court, to this Court and back to the Washington Court has already been traced. In *Walker River Paiute Tribe and Stephen King v. John Sheehan, et al*, Civ. No. R-2888-BRT (D.C. Nev., May 3, 1974) the United States District Court for the District of Nevada held on principles analogous to those of the Idaho Supreme Court in the present controversy, that the Nevada cig-

arette tax could not be imposed on cigarettes sold to non-Indian customers on the Paiute Reservation. On the other hand, in *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana ("Tribe") et al. v. John C. Moe, et al,* Civil No. 2145 (D.C. Mont. May 9, 1974), a three-judge panel held that the Montana sales/use tax on cigarettes could be applied to sales of cigarettes on Montana reservations to non-Indians but could not be imposed on sales of cigarettes to tribal members. The Montana District Court adopted an entirely different reading of this Court's decision in *McClanahan.* The divergence in the approaches of these Courts clearly reflects the difficulty; the recent decisions in *McClanahan* and *Mescalero* do not provide answers to the problem presented in sales or use tax issues. This is evidenced by the fact that the Montana Court in *Confederated Salish et al v. John C. Moe, et al,* supra, concluded the matter was not governed by *McClanahan* and *Mescalero,* while the Nevada Court felt that at least by analogy adequate guidance was presented in *McClanahan* and *Mescalero* to dictate a decision directly contrary to that of the Montana Court. *Walker River Paiute Tribe and Stephen King v. John Sheehan, et al,* Civ No. R. 2888-BRT, (D.C. Nev., May 3, 1974.).

The Idaho Supreme Court in the present case attempted to discern the direction provided by this Court. The majority felt that by the remand of *Tonasket* this Court had somehow indicated that the *McClanahan* decision applied to *sales* as well as income taxes.

"In its decision in the case, the Washing-

ton Supreme Court held that the Washington cigarette tax could be applied to the on-reservation sale of cigarettes by an Indian, most of whose customers were non-Indians.

> "In vacating the Washington judgment, the Supreme Court of the United States ordered the Supreme Court of Washington to reconsider its decision in light of the former's recent unanimous decision in McClanahan v. State Tax Commission of Arizona,__ U.S., 93 S. Ct. 1257 (1973). The Supreme Court of the United States thereby indicated that the principles enunciated in *McClanahan* are applicable in cases such as this involving a state's attempt to tax on-reservation sales consummated by Indian sellers, even though *McClanahan* itself involved a state's attempt to tax personal *income* earned by an Indian solely from reservation sources". *Mahoney v. State Tax Comm.* 524 P. 2d 187.

On the other hand, the dissent was equally troubled by the lack of guidance:

> "Certainly, the opinion of the Supreme Court of Washington in *Tonasket* is not binding on this Court. Nevertheless, I find it well-reasoned, scholarly and highly persuasive. In my judgment the cavalier treatment of *Tonasket* by the United States Supreme Court only muddies further the troubled waters surrounding state jurisdiction over Indians. The Court's opinion in *Mescalero Apache Tribe v. Jones*, __*U.S.*__, 93 S. Ct. 1267 (1973) further compounds this confu-

sion. *Mescalera* was issued the same day as *McClanahan*.

"... As a result of *McClanahan* and *Mescalero* and the lack of guidance offered by *Tonasket*, the courts are left to their own resources in grappling with the mind-boggling distinction between *Mescalero* and *McClanahan* ...." *Mahoney v. State Tax Comm.* 524 P. 2d 187.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Idaho.

Respectfully submitted,

W. ANTHONY PARK
ATTORNEY GENERAL
STATE OF IDAHO

WILLIAM McDOUGALL
ASSISTANT ATTORNEY
GENERAL

ROBERT L. MILLER
CHIEF DEPUTY
ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of October, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Jerrold E. Park, McFadden & Park, Attorneys at Law, St. Maries,

Idaho 83861; Robert D. Dellwo, Dellwo, Rudolf & Schroeder, 1016 Old National Bank Building, Spokane, Washington 99201, and Daniel H. Israel, Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302, Hamilton & Hamilton, Attorneys at Law, 203 Elder Bldg., Coeur d'Alene, Idaho 83814, counsel for Respondent. I further certify that all parties required to be served have been served.

WILLIAM McDOUGALL
WILLIAM McDOUGALL
ASSISTANT ATTORNEY
GENERAL
STATE OF IDAHO

APPENDIX I

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 11016

JOHN GEORGE MAHONEY, Plaintiff,	)	
MARGARET ROSE MAHONEY, Plaintiff-Respondent,	)	Coeur d'Alene, May
v.	)	Term, 1974
STATE OF IDAHO, STATE TAX COMMISSION Defendant-Appellant.	)	Filed: July 8, 1974 R. H. Young, Clerk

ON PETITION FOR REHEARING
DONALDSON, J.

The petition for rehearing in the above entitled action was granted and reargued. The Court has reviewed the record, considered the arguments presented by counsel, and we continue to adhere to the views expressed and the conclusion reached in our earlier opinion.

McQUADE and McFADDEN, J.J., concur.

SHEPARD, C. J. adheres to his dissent in the earlier opinion.

BAKES, J. adheres to his special concurrence and dissent in the earlier opinion.

APPENDIX II

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 11016

JOHN GEORGE MAHONEY Plaintiff, MARGARET ROSE MAHONEY, Plaintiff-Respondent,	)	
v.	)	Coeur d'Alene, October term, 1972 Filed: September 5,
STATE OF IDAHO, STATE TAX COMMISSION Defendant-Appellant.	)	1973 R. H. Young, Clerk.

Appeal from the District Court of the First Juidicial District of the State of Idaho, Benewah County. Hon. Watt E. Prather, District Judge.

Appeal from judgment restraining the State of Idaho from taxing the on-reservation sale of cigarettes by members of Indian tribe and allowing recovery for cigarettes seized by the State. *Judgment Affirmed.*

W. Anthony Park, Attorney General, and Robert L. Miller, Deputy Attorney General, Boise, for appellant.

McFadden & Park, St. Maries, and Hamilton & Hamilton, Coeur d'Alene, for respondent.

DONALDSON, C. J.

The original plaintiff in this action was John George Mahoney, who sought to recover 784 cartons of cigarettes seized by the defendant-appellant Idaho State Tax Commission and to restrain the Commission from interfering with the plaintiff's cigarette-vending business. Subsequent to the filing of this action, the respondent Margaret Rose Mahoney acquired all interests in the confiscated property and was, therefore, substituted as plaintiff for John George Mahoney, as to whom the action was dismissed.

The respondent and her predecessor in interest are both members of the Coeur d'Alene Indian Tribe. On June 21, 1968, an agent of the Tax Commission seized the respondent's cigarettes because they did not bear Idaho cigarette tax stamps. At the time of the seizure, the cigarettes were located at the respondent's on-reservation tobacco shop and were being held for sale to both Indian and non-Indian purchasers. A substantial portion of the respondent's sales were made to non-Indian members of the general public. The cigarettes seized by the State were purchased by the respondent in Spokane, Washington, and transported to the reservation in the respondent's personal automobile.

The respondent's concession is located one mile north of Plummer, Idaho, just off U.S. Highway 95, a major north-south route through this state, carrying a large volume of daily traffic. The respondent's business is a private enterprise in no way connected with tribal business, and its owner is not engaged in performing a tribal function.

Since the cigarettes seized by the Commission were perishable, the parties agreed that they should be sold and that the proceeds of sale ($1,484.15) should be held pending the outcome of the action.

Section 63-2503 of the Idaho Code provides that "(t)here is hereby levied, and there shall be collected as hereinafter provided, a tax upon *the retail sale of cigarettes*". (Emphasis added) As amended in 1972, this section currently imposes this sales tax at the rate of 9/20 of 1c per cigarette, or 90c per standard carton of 200 cigarettes. If the respondent's sales are exempt from this tax, she would obviously have a 90c-per-carton competitive advantage over vendors not located on Indian land.

The district court held that Idaho lacks jurisdiction to tax the on-reservation sale of cigarettes by Indians. Judgment was entered in favor of the respondent Indian for $1,484.15, plus interest and costs; in addition, the court permanently enjoined the Tax Commission from interfering with the operation of the respondent's business. On appeal, the Tax Commission asserts that the cigarettes were seized only because they were being held *for sale to non-Indians*. The appellant disclaims any right to tax on-reservation sales by Indians to Indians. Nor does the appellant challenge the district court's finding that the Coeur d'Alene Indian Tribe has never entered into any agreement consenting to the taxation of its members by the State of Idaho.

I

During the pendency of this appeal, the Supreme Court of the United States vacated the judgment of the

Washington Supreme Court in *Tonasket v. State*, 488 P. 2d 281 (Wash. 1971), relied upon by the appellant herein. *Tonasket v. Washington*, __U.S, __, 41 LW 4546 (April 24, 1973) (per curiam). In its decision in the case, the Washington Supreme Court held that the Washington cigarette tax could be applied to the on-reservation sale of cigarettes by an Indian, most of whose customers were non-Indians.[1] In vacating the Washington judgment, the Supreme Court of the United States ordered the Supreme Court of Washington to reconsider its decision in light of the former's recent unanimous decision in *McClanahan v. State Tax Commission of Arizona*, __U.S. __, 93 S.Ct. 1257 (1973). The Supreme Court of The United States thereby indicated that the principles enunciated in *McClanahan* are applicable in cases such as this involving a state's attempt to tax on-reservation sales consumated by Indian sellers, even though *McClanahan* itself involved a state's attempt to tax personal *income* earned by an Indian solely from reservation sources.

The holding of the Court in *McClanahan* is perhaps

[1] The Washington Court distinguished Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) (invalidating a state gross sales tax as applied to sales made to reservation Indians by federally licensed Indian traders), on three grounds, saying that the third was the most significant: (1) Tonasket had no federal license; (2) the bulk of his trade was with non-Indians; and (3) his tribe had submitted itself to the jurisdiction of the state, and the state had assumed such jurisdiction, as permitted by federal law. The 1953 Act enabling certain states to unilaterally assume jurisdiction in Indian country (Public Law 280, 67 Stat. 588, Sec. 7) was repealed by the 1968 Civil Rights Act (Public Law 90-284, 82 Stat. 79, Title IV, Sec. 403(b)), but the 1968 Act specifically provides that "such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal." 25 U.S.C.A. Sec. 1323 (b); Boyer v. Shoshone-Bannock Indian Tribes, 92 Ida. 257, 261, 441 P.2d 167 (1968). A state may now assume jurisdiction over reservation Indians only "with the consent of the tribe occupying the particular Indian country." 25 USCA Secs. 1321(a), 1322(a). *See* McClanahan v. State Tax Comm'n of Ariz., __U.S.__, 93 S. Ct. 1257, 1265 (1973).

best described by the Supreme Court itself in *Mescalero Apache Tribe v. Jones*, ___U.S. ___, 93 S.Ct. 1267, 1270 (1973), released the same day as *McClanahan:*

> "(I)n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona*, ___U.S. ___, 93 S.Ct. 1257, 35 L. Ed.2d ___, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional conent."

II

The federal government's authority over Indian matters derives from the Federal Constitution's delegation to it responsibility for regulating commerce with Indian tribes and for making treaties. *McClanahan v. State Tax Comm'n of Arizona, supra* at 1262 n. 7; *U.S. Const.* Art. I, Sec. 8, cl. 3; Art. II, Sec. 2, cl. 2. Under Article I, section 8, clause 3 of the United States Constitution, the Congress has the power "(t)o regulate commerce with foreign nations, and among the several states, *and with the Indian tribes.*" (Emphasis added).

It is beyond dispute that the Commerce Clause would preclude the imposition of Idaho *sales* tax upon sales which are consummated in a sister state. *Evco v. Jones*, ___U.S. ___, 93 S.Ct. 349 (1972) (per curiam); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944). For Idaho to impose a tax on such transactions "would be to project its powers beyond its boundaries and to tax an in-

terstate transaction." *McLeod v. J. E. Dilworth Co., supra* at 330. As the United States Supreme Court went on to say in *McLeod:*

> "(A) tax on an interstate sale like the one before us (unlike a use tax) involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several states. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." 322 U.S. at 330-331.

Of course, the *McLeod* case dealt with commerce "among the several states"; but by its own terms, the Commerce Clause applies with equal force to commerce "with the Indian tribes." It follows, therefore, that the Commerce Clause precludes the imposition of Idaho sales tax upon the on-reservation sale of cigarettes by members of an Indian tribe to non-Indian purchasers. *See McClanahan v. State Tax Comm'n of Arizona, supra.*

The tax levied upon the respondent by Idaho is characterized by the operative statute itself as "a Tax upon the retail sale of cigarettes." I.C. Sec. 63-2503. In this case, the state is attempting to tax sales occurring within the boundaries of an Indian reservation, not sales occurring within Idaho's domain. *Idaho Organic Act*, Sec. 1; *Idaho Const.* Art. 21, Sec. 19 ("Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.") *Compare Worcester v. Georgia*, 31 U.S. 515, 560-561

(1832) *and Boyer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 257, 441 P.2d 167 (1968) *with McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). To paraphrase *McLeod*, a tax on sales made by Indians on Indian reservations involves an assumption of power by a state which the Commercial Clause was meant to end. That clause vested in Congress, not in the states, the power of taxing a transaction forming an unbroken process of commerce with the Indian tribes. *McLeod v. J. E. Dilworth Co., supra.* Here, as in *McClanahan*, the tax imposed may be successfully resisted because "the State is totally lacking in jurisdiction." 93 S.Ct. at 1267.

The appellant tax commission argues, somewhat weakly, that it can collect cigarette tax from the respondent because her cigarettes became subject to the state's taxing jurisdiction when they passed through non-reservation Idaho territory while in transit to the respondent's place of business on the reservation. This argument is based upon I.C. Sec. 63-2501, which in pertinent part provides:

> "It is the intent and purpose of this act to levy a tax *on all cigarettes* sold, used, consumed, *handled* or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes." (Emphasis added.)

We may assume *arguendo*, without deciding, that I.C. Sec. 63-2501 is effective to make the handling of cigarettes an incidence of taxation, despite the more specific language of I.C. Sec. 63-2503—i.e., "there is hereby

levied, and there shall be collected as hereinafter provided, a tax *upon the retail sale of cigarettes*" (emphasis added). The appellant's contention still must fail, for two reasons: First, as the respondent correctly points out, nothing in the record affirmatively indicates that the respondent's cigarettes ever passed through non-reservation Idaho territory. We may take judicial notice of the geographical facts that the western boundary of the Coeur d'Alene Indian reservation is contiguous to Washington's eastern border, and there are roads going from the vicinity of Spokane directly onto the reservation. Idaho Dep't. of Highways, 1973 Official Highway Map; *see* I.C. Sec. 9-101, subd. 8. Therefore, it is not only possible but quite probable that the cigarettes in question traveled from Spokane to the respondent's place of business on the reservation without ever passing through non-reservation Idaho territory. Second, it is elementary hornbook law that "the states may not tax property in transit in interstate commerce." *Minnesota v. Blasius*, 290 U.S. 1, 9 (1933). Thus, for example, Arkansas has no authority to tax cigarettes in transit from Missouri to Texas, *Pfeiffer v. State*, 295 S.W.2d 365 (Ark. 1956) (excise tax); *see* Annot., 46 A.L.R. 3d 1342, 1352 (1972). It would seem to follow that a state may not tax goods in transit from a sister state to reservation Indians. U.S. Const. Art. I, Sec. 8, cl. 3.

Also relied upon by the appellant is *Makah Indian Tribe v. Tax Comm'n*, 434 P.2d 580 (Wash. 1967), *appeal dismissed for want of a substantial federal question*, 393 U.S. 8 (1968) (mem.), in which the Washington Supreme Court rejected a Commerce Clause

challenge and held that Washington could collect its cigarette tax from off-reservation, non-Indian wholesalers who supply their products to retail outlets doing business on a reservation. The facts of that case distinguish it from the case at bar. As the Washington court itself indicated:

> "It is noted that, in its practical application, the Washington cigarette tax applies to and is paid by the wholesalers who distribute the cigarettes to retail outlets for resale. At the time the tax is paid and the tax stamps evidencing payment are affixed to a package, *the cigarettes are the inventory of non-Indian wholesalers conducting their business activities wholly outside of any Indian reservation;* the cigarettes have neither been specifically identified as those to be sold on an Indian reservation nor as those to be sold at retail to Indians.
>
> * * *
>
> "(T)he tax here involved does not represent state legislation 'on the subject' of Indian trading, but rather upon the subject of the wholesale distribution *activities carried on wholly outside of any Indian reservation.*
>
> * * *
>
> "Neither the plaintiff Tribe nor any of its members are cigarette wholesalers. *The tax on cigarettes is not collected by the State of Washington from the Makah Tribe or from any members of that Tribe. It is collected only from wholesalers and distributors as a result of their doing business outside the boundaries of any Indian reservation.*
>
> " * * * (T)he incidence of the tax oc-

curred *outside of any Indian reservation and prior to the entry of the cigarettes into Indian commerce.*" 434 P.2d at 581-582 (emphasis added).

In the case before us today, the incidence of the tax falls squarely upon sales by an Indian on a reservation; this tax is nothing less than a direct tax upon commerce with the Indian tribes, and "such taxation is not permissible absent congressional consent." *Mescalero Apache Tribe v. Jones, supra* at 1270 (summarizing the holding of *McClanahan v. State Tax Comm'n of Arizona, supra).*

III

The case at bar is not, moreover, merely one in which congressional consent is absent; rather, it is one in which congressional denial of the power asserted is manifest. In passing the Buck Act, now 4 U.S.C.A. Secs. 105-110, Congress in effect stated its intention to maintain the existing tax exempt status of sales made by reservation Indians. The Buck Act permits states to levy sales, use, or income taxes within any federal area (meaning "any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States," 4 U.S. C.A. Sec. 110(e). But the Buck Act also expressly provides that: "Nothing (herein) shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." 4 U.S.C.A. Sec. 109. The Buck Act was approved by the Senate on September 30, 1940, and by the House on October 1, 1940. When Congress excepted Indians "not otherwise taxed," it must have been aware of two opinions released by the

Solicitor of the Interior Department earlier in 1940. In an opinion of May 8, 1940, the Solicitor held:

> "Traders on Indian reservations who are non-Indian * * * must account to the State authorities for sales taxes on so much of their business as is done with non-Indians. They are not required to account to the State authorities for their transactions with Indians on the reservations, but are, if they do deal with the Indians, required to conform with the licensing provisions in the Federal statutes regulating trade with Indians. *Traders who are themselves Indians are not subject to the State laws whether they deal with Indians or non-Indians.*
>
> * * * Where traders are not located on Indian reservations they are, in my opinion, responsible for the State taxes and subject to license whether or not they are Indians and whether or not they deal with Indians." 57 I.D. 124, 126 (1940) (emphasis added), *overruled in part as to another holding*, 58 I.D. 562, 567 (1943), *cited with approval in* Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U. S. 685, 690 (1965), *and in* 58 I.D. 562, 563.

Later in May, 1940, in an opinion of obvious relevance to the case at bar, the Solicitor ruled that a state tax on the selling of tobacco products could not be applied to the selling of such products by the commissary of the Menominee Indian Mills to employees and the general public. Said the Solicitor:

> "III. Application of State Sales Tax on Tobacco Products

"The Wisconsin laws of 1939 (chs. 433, 518) place an occupational tax on the sale or other disposition of tobacco products except in the case of sales 'for shipment in interstate or foreign commerce.' Manufacturers and wholesalers are required to pay the tax by purchasing and affixing State stamps on the tobacco products. The statute makes it unlawful for other than registered salesmen to sell tobacco products in the State or to purchase such products from other than licensed wholesalers. Under this law the State authorities claim from the Menominee Indian Mills several hundred dollars in taxes based on the inventory of tobacco products on hand in the mills' commissary as of the date of the passage of the act.

* * *

"(2) The application of this tax to the Menominee Indian Mills would constitute a regulation of trade with the Indians which is beyond the power of the State. Commerce with Indian tribes might have been included in the exceptions provided in the State law along with the exception of sales in interstate and foreign commerce, since all three such types of commerce are placed by the Constitution under the regulatory power of Congress. In my memorandum of February 4, 1938, *supra*, holding that State sales taxes did not apply to purchases made by or from Indians on Indian reservations, I referred to the fact that it was well established that Indians are not amenable to State laws while on their reservations unless expressly subjected to those laws by Congress. *The Kansas Indians*, 5 Wall 737,

755, 756; *United States v. Kagama*, 118 U.S. 375; *United States v. Rickert*, 188 U.S. 432; *United States v. Quiver*, 241 U.S. 602; *United States v. Hamilton*, 233 Fed. 685; *In re Blackbird*, 109 Fed. 139; *In re Lincoln*, 129 Fed. 247; *State v. Rufus*, 237 N.W. 67.

* * *

"3. The Menominee Indian Mills are not liable for the State tax placed on tobacco products, where tobacco products are sold through the commissary of the mills, whether the products are sold to Indians or to other persons." 57 I.D. 129, 140-141 (1940).

With these opinions fresh in mind, Congress expressly chose to exclude reservation Indians from the purview of the Buck Act, 4 U.S.C.A. Sec. 109; McClanahan v. State Tax Comm'n of Arizona, *supra;* Warren Trading Post Co., v. Arizona State Tax Comm'n, 380 U.S. 685, 691 n. 18 (1965). As stated in a Solicitors opinion released three years after Congress passed the Buck Act:

> "That act, however, contains no indication of any intent on the part of Congress to interfere with the regulation by the Commissioner of Indian Affairs of trade with the Indians on Indian reservations or to burden the Indians with a tax to which they could not then legally be subjected. On the contrary, section 5 of the act declares that the permission given to the States shall not 'be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' While this declaration is somewhat awkwardly phrased the meaning is plain.

> Basic Indian immunities under the law in force prior to the enactment were not to be disturbed nor were new immunities to be created. The legality of State taxes on sales to Indians thus is to be determined not by but independently of the provisions of the act of October 9, 1940. Under this view, the opinion of May 8, 1940, is correct * * * ." 58 I.D. 562, 563 (Dec. 24, 1943). *See generally* The Department of the Interior's *Federal Indian Law* 867-873 (1958) (Oceana Publications ed. 1966).

What the Supreme Court said about Arizona's income tax in *McClanahan* is equally appropriate here:

> "Indeed, Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C.A. Sec. 104 et seq., which provides comprehensive federal guidance for state taxation of those living within federal areas. Sec. 106(a) of Title 4 grants to the States general authority to impose an income tax on residents of federal areas, but Sec. 109 expressly provides that 'Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' To be sure, the language of the statute itself does not make clear whether the reference to 'any Indian not otherwise taxed' was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to except reservation Indians from coverage of the Buck Act, see S.Rep. No. 1625, 76th Cong.

3d Sess., 2, 4; 84 Cong. Rec. 10685 (1939), and this Court has so interpreted it. See Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685, 691, 85 S.Ct. 1242, 1245, 14 L.Ed.2d 165 n. 18 (1965). While the Buck Act itself cannot be read as an affirmative grant of tax exempt status to reservation Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization." McClanahan v. State Tax Comm'n of Arizona, *supra* at 1264-65.

IV

Here, as in *McClanahan*, the Tax Commission contends that since it has only attempted to tax an individual Indian and not the tribe or reservation as such, its efforts must be sustained because tribal self-government has not been infringed.[2] And, relying upon the Arizona appellate court's decision in *McClanahan*, the state further contends that it is irrelevant whether its tax infringes upon the respondent's rights as an indivi-

[2] In support of this contention, the appellant relies upon cases such as Williams v. Lee, 358 U.S. 217 (1959), which state that the test for determining the validity of state action is "whether (it) infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. In that portion of the *McClanahan* opinion hereinafter quoted in the text of this opinion, the Supreme Court apparently limits the applicability of the *Williams* test to cases involving *non-Indians.*

dual Indian. The response of the Supreme Court to these contentions is instructive:

> "In fact, we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination. But even if the State's premise is accepted, we reject the suggestion that the *Williams* test [1] was meant to apply in this situation. It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. See also Organized Village of Kake v. Egan, 369 U.S. 60, 75-76, 82 S.Ct. 562, 570-571, 7 L.Ed. 2d 573 (1962). In these situations, both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.
>
> "The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaties and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed. On the contrary, this Court expressly rejected such a position only two years ago. In Kenner-

[1] See note 2, *supra*.

ly v. District Court, 400 U.S. 423, 91 S. Ct. 480, 27 L.Ed.2d 507 (1971), the Blackfeet Indian Tribe had voted to make state jurisdiction concurrent within the reservation. Although the State had not complied with the procedural prerequisites for the assumption of jurisdiction, it argued that it was nonetheless entitled to extend its laws to the reservation since such action was obviously consistent with the wishes of the Tribe and, therefore, with tribal self-government. But we held that the *Williams* rule was inapplicable and that '(t)he unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction.' 400 U.S. at 427, 91 S.Ct. at 482. If Montana may not assume jurisdiction over the Blackfeet by simple legislation even when the Tribe itself agrees to be bound by state law, it surely follows that Arizona may not assume such jurisdiction in the absence of tribal agreement.

* * *

"Finally, we cannot accept the notion that it is irrelevant 'whether the . . . . state income tax infringes on (appellant's) rights as an individual Navajo Indian,' as the State Court of Appeals maintained. McClanahan v. State Tax Commission, 14 Ariz. App. 452, 454, 484 P.2d 221, 223 (1970). To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that 'the ques-

> tion has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them.' Williams v. Lee, *supra*, at 220 of 358 U.S. at 271 of 79 S.Ct. (emphasis added). In this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." McClanahan v. State Tax Comm'n of Arizona, *supra* at 1266-67.

In the absence of congressional consent, the Idaho State Tax Commission had no jurisdiction to tax the on-reservation sale of cigarettes by an Indian seller, whether the purchasers were Indians or non-Indians. U.S. Const. Art. I, Sec. 8, cl. 3. Where, as here, Congress has manifested its intent to deny the states the power to collect such a tax, it is irrelevant that its imposition would not infringe upon tribal self-government. McClanahan v. State Tax Comm'n of Arizona, *supra*. The decision of the district court is correct and accordingly must be affirmed.

Judgment affirmed. Costs to respondent.

McQUADE AND McFADDEN, JJ., concur.

SHEPARD, J., dissenting.

I respectfully dissent. The majority discusses at length the State's ability to collect a sales tax upon goods sold by an Indian. In the case at bar, however, the plaintiff protests the State's seizure of 784 cartons of cigarettes. Apparently, the cigarettes lacked Idaho tax stamps.

In Tonasket v. State, 488 P.2d 281 (Wash. 1971) the

Washington Court was faced with an almost identical situation. In *Tonasket* the state also seized cigarettes not bearing the Washington tax stamp and charged the Indian owner with a criminal violation. The Washington Court, after extensively reviewing the pertinent state and federal statutes and the decisions of the United States Supreme Court, sustained the position of the State of Washington, On appeal the Supreme Court of the United States did not reverse the decision of the Washington Supreme Court. Instead, the Supreme Court vacated the judgment so the Washington Court could consider the effect of McClanahan v. State Tax Commission of Arizona, ___U.S. ___, 93 S.Ct. 1257 (1973).

The majority opinion herein suggests the Supreme Court of the United States "thereby indicated that the *principles* enunciated in *McClanahan* are applicable in cases such as this * * * ." I respectfully disagree.

Certainly, the opinion of the Supreme Court of Washington in *Tonasket* is not binding on this Court. Nevertheless, I find it well-reasoned, scholarly and highly persuasive. In my judgment the cavalier treatment of *Tonasket* by the United State Supreme Court only muddies further the troubled waters surrounding state jurisdiction over Indians. The Court's opinion in Mescalero Apache Tribe v. Jones, ___U.S. ___, 93 S.Ct. 1267 (1973) further compounds this confusion. *Mescalero* was issued the same day as *McClanahan*.

The Washington Supreme Court in *Tonasket* notes recent federal legislation enabling states to assume certain jurisdiction over Indians and Indian lands. The

State of Washington did assume such jurisdiction. In *McClanahan* the Court founded its opinion almost entirely on the supposed fact that Arizona had not assumed such jurisdiction. As a result of *McClanahan* and *Mescalero* and the lack of guidance offered by *Tonasket*, the courts are left to their own resources in grappling with the mind-boggling distinction between *Mescalero* and *McClanahan*. The Court in *McClanahan* stated:

> "We are far from convinced that when a State imposes taxes upon reservation members without their consent, *its action can be reconciled with tribal self-determination.*" (Emphasis supplied) 93 S.Ct. at 1266.

On the other hand, the *Mescalero* court had little difficulty in finding that when a tribe ran a ski resort on certain leased federal lands, the ski resort's income was subject to state taxation. The Court ruled such taxation was not an undue interference with tribal self-government. In *Mescalero* the court quoted with approval Shaw v. Gibson-Zahniser Oil Co., 276 U.S. 575, 579-581, (1928) and said:

> "'The early legislation affecting the Indians had as its immediate object the closest control by the government of their lives and property. The first and principle need then was that they should be shielded alike from their own improvidence and the spoliation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners * * * .
>
> "But to hold them immune would be inconsistent with one of the very purposes

> of their creation, to educate the Indians in responsibility * * * .'" 93 S.Ct. at 1273.

The Washington Court in *Tonasket* stated:

> "It is suggested by the plaintiff that the regulating and taxing of his sales of cigarettes by the state interferes with tribal government.
> * * *
> "The plaintiff in this case has entered into the commercial life of the community in which he lives. He sells a product manufactured by others, the sale of which the state has found it desirable and necessary to regulate. The plaintiff does not question the right of the state to impose a tax upon the sale of cigarettes generally. But he contends that he should be exempt from the duty of collecting and remitting the tax and should thus enjoy a competitive advantage over non-Indian sellers of cigarettes." 488 P.2d at 288.

I suggest that the State in the instant case did not interfere with tribal self-government of the Coeur d' Alene Indians. I believe the taxation of the plaintiff herein is no different than that of any other who has set up a business. Having entered commerce, the Indian plaintiff must shoulder his fair share of the community's tax burden.

BAKES, J., concurring specially and dissenting in part:

The majority of this Court has determined the Idaho cigarette tax to be a tax upon the retail sale of cigarettes. Therefore, the result reached by the majority is probably correct because the cigarettes in question here

were seized before they were sold at retail, and therefore technically no tax was due and owing by the plaintiff on them. However, in my view, the incidence of the tax imposed by the Idaho Cigarette Tax Act can occur, and in this case does occur much earlier in the chain of distribution than the retail sale, and this raises serious constitutional issues. However in view of the holding of the majority concerning the nature of the Idaho cigarette tax, no useful purpose would be served by an analysis of all of the possible constitutional ramifications which would result from a holding that the incidence of the Idaho cigarette tax occurs much earlier in the distribution chain than the retail sale.

APPENDIX III

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

JOHN GEORGE MAHONEY, Plaintiff,	) No. 3666
vs	)
STATE OF IDAHO, STATE TAX COMMISSION	) COMPLAINT
Defendant.	)

Comes now the above named plaintiff and for cause of action alleges:

I.

Plaintiff is an Indian and is an enrolled member of the Coeur d'Alene tribe.

II.

Plaintiff has been operating cigarette stores on Indian Trust land located in Benewah County and was so operating on June 21, 1968.

III.

That on that date, Roy Dahl, an agent of, and acting under the authority of the Idaho State Tax Commission did wrongfully seize and take away 784 cartons of plaintiff's cigarettes located on Indian Trust land, which cigarettes are presently in the possession of said

Tax Commission. The Tax Commission has refused to re-deliver the cigarettes to plaintiff, although plaintiff has filed a written claim with the Tax Commission claiming ownership thereof, and a demand for their return to plaintiff.

IV.

That the State Tax Commission has no jurisdiction over commerce on Indian Trust land and had no right to go thereon and seize said cigarettes. The jurisdiction of said Indian Trust land rests solely in the Federal Government.

V.

That the plaintiff has no adequate remedy at law or otherwise, for the financial losses suffered by loss of future business, and loss of profits therefrom. Plaintiff is being deprived of an opportunity of earning his livelihood.

WHEREFORE, plaintiff prays:

1. That defendant and its agents be permanently enjoined from disposing of the 784 cartons of cigarettes claimed by the plaintiff.

2. Be permanently enjoined from interfering with plaintiff's operation of a cigarette vending business on Indian Trust land.

3. Defendant be required to return the 784 cartons of cigarettes to the plaintiff.

4. Or in the alternative, in the event the Court finds said seizure to be lawful, that the defendant be

required to deliver the 784 cartons of cigarettes to the plaintiff upon the delivery to the defendant by the Clerk of the District Court of the sum of $548.86, which is tendered into the Court with this complaint.

Dated this 1st day of July, 1968.

HAMILTON & HAMILTON
Attorneys for Plaintiff. Residence &
P.O. address: Coeur d'Alene, Idaho

APPENDIX IV

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

JOHN GEORGE MAHONEY,	)	
Plaintiff,	)	No. 3666
vs.	)	
STATE OF IDAHO,	)	MEMORANDUM
STATE TAX COMMISSION	)	OPINION
Defendant.	)	

The above entitled action was heard before the Court on May 14th, 1971. At that time, upon the conclusion of the hearing, the plaintiff was granted thirty (30) days within which to file a brief and the defendant fifteen (15) days thereafter within which to file an answering brief. The plaintiff's brief was filed herein on June 14, 1971. The defendant's brief was due June 29, 1971. The defendant has not made or requested any extension of time within which to file said brief and the Court, therefore, concludes that defendant has waived the filing of its brief and that this matter is deemed submitted and ready for decision.

At the hearing on May 14, 1971, the facts were stipulated to the Court. From these facts it appears that Indians of the Coeur d'Alene Indian Tribe, namely John George Mahoney and Margaret Rose Mahoney, owned and had in their possession cigarettes. This

was upon Indian trust lands within the Coeur d'Alene Indian Reservation. The cigarettes were held for sale and were sold to both Indians and other non-Indian members of the general public.

The plaintiff in its brief has succinctly stated the issue:

> Does the State of Idaho have jurisdiction to levy and collect excise taxes on cigarettes and sales thereof, where such cigarettes are held for sale and sold by members of the Coeur d'Alene Tribe of Indians on trust lands within the Coeur d'Alene Indian Reservation?

The Court concludes this question must be answered in the negative.

As a corollary to federal sovereignty it is clear that state law has no force and effect, except as granted by federal law, within the territory of an Indian tribe in matters affecting Indians.

> Boyer - vs. Shoshone - Bannock Indian Tribes, 92 Idaho 257.

Nothing in the present record shows this case to come within any of the provisions of I.C. 67-5101 as to those matters upon which the state courts have jurisdiction of matters in Indian reservations. Nor is there any showing that there was any bilateral agreement between the Coeur d'Alene Indian Tribe and the State of Idaho subjecting the members of the tribe to the state's excise tax. (See Boyer vs. Shoshone-Bannock Indian Tribes, supra). It further appears that this position had been previously recognized admini-

stratively by the State of Idaho through an assistant attorney general speaking on behalf of the tax collector of the State of Idaho.

It is, therefore, concluded that the cigarettes were not subject to the excise taxes of the State of Idaho and were wrongfully seized by the defendant herein. The proceeds derived from the sale of said cigarettes should be delivered to the plaintiffs together with interest thereon and their costs of suit herein.

Will counsel for the plaintiff herein prepare Findings of Fact, Conclusions of Law and Judgment consistent herewith.

Dated and done this 19th day of July, 1971.

/s/ Watt E. Prather
District Judge

APPENDIX V

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

JOHN GEORGE MAHONEY, AND MARGARET ROSE MAHONEY, Plaintiffs,	)	Case No. 3666
vs.	)	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW
STATE OF IDAHO, STATE TAX COMMISSION, Defendant.	)	

The above-entitled action was heard before the Court in St. Maries, Idaho on May 14, 1971. Plaintiffs were represented by their attorney Jerrold E. Park of McFadden & Park, and the defendant was represented by Robert L. Miller, Assistant Attorney General; the facts having been stipulated by the parties. The Court, having considered the brief filed by plaintiffs and arguments of counsel and no brief having been filed by defendant, and being fully advised in the premises, rendered its decision and made and entered Findings of Fact and Conclusions of Law and Judgment, to which defendant filed timely objection. Such objection having been resolved and withdrawn on the basis of a stipulation of counsel filed herein, the Court hereby withdraws and sets aside the Findings, Conclusions

and Judgment heretofore entered and hereby makes and enters the following Amended Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This action was originally filed by John George Mahoney, as plaintiff, but it appears from an affidavit of defendant, to which is attached a Bill of Sale, that John George Mahoney has sold and assigned his interest in the subject matter of this litigation to Margaret Rose Mahoney.

2. Plaintiff's attorney has moved to substitute Margaret Rose Mahoney as a party plaintiff, which motion has been granted and Margaret Rose Mahoney has been made the plaintiff herein, as successor in interest to the original plaintiff.

3. Plaintiffs John George Mahoney and Margaret Rose Mahoney are both enrolled members of the Coeur d'Alene Tribe of Indians.

4. In June, 1968 plaintiffs owned and had in their possession 784 cartons of cigarettes, which did not bear Idaho cigarette tax stamps. These cigarettes were located upon Indian trust lands within the Coeur d'Alene Indian Reservation in Benewah County, Idaho, and were held for sale and sold to Indian and non-Indian purchasers. On June 21, 1968 said cigarettes were seized by an agent of the Idaho State Tax Commission.

5. On or before September 18, 1968, by agreement of the parties, the cigarettes were sold for a

total sum of $1,484.15, which sum is being held by the State Tax Commission, pursuant to such agreement, in a suspense fund pending determination of this matter.

6. Upon the filing of this action, plaintiffs sought the issuance of a restraining order and injunction to prevent disposal of the cigarettes, in connection with which application plaintiff's attorney deposited the sum of $548.80 with the Clerk of this Court to secure the issuance of such order. Such security is no longer required and should be refunded to plaintiffs.

7. The facts of this matter were stipulated by the parties in open court at said hearing, and nothing in said stipulation or elsewhere in the record shows this case to come within any of the provisions of Idaho Code §67-5101 as to those matters upon which the State courts have jurisdiction of matters in Indian reservations. Nor is there any showing that there has ever been any bilateral agreement between the Coeur d'Alene Indian Tribe and the State of Idaho subjecting the members of the Tribe to the State's excise taxes.

CONCLUSIONS OF LAW

1. Margaret Rose Mahoney shall be and is hereby substituted as party plaintiff in this action.

2. The single issue presented by the stipulated facts herein is as follows:

> Does the State of Idaho have jurisdiction to levy and collect excise taxes on cigarettes and sales thereof, where such cigarettes are held for sale and sold by members of the Coeur d'Alene Tribe of In-

dians on trust lands within the Coeur d'Alene Indian Reservation?

This question must be and is answered in the negative.

3. The 784 cartons of cigarettes which are the subject matter of this action and sales thereof by plaintiffs on trust lands within the Coeur d'Alene Indian Reservation were not subject to the excise taxes of the State of Idaho.

4. The said cigarettes were wrongfully seized by the defendant from the plaintiffs herein.

5. The proceeds derived from the sale of said cigarettes, being $1,484.15, should be delivered to the plaintiff, Margaret Rose Mahoney, with interest thereon at the statutory rate from September 18, 1968 to date, in the amount of $260.00.

6. The $548.80 deposited by plaintiffs' attorneys in lieu of bond shall be returned to them and the bond exonerated.

7. The defendant, State of Idaho, State Tax Commission and its agents and employees shall be permanently enjoined from interfering with plaintiff Margaret Rose Mahoney's operation of a cigarette vending business upon trust lands within the Coeur d'Alene Indian Reservation.

8. The plaintiffs shall be awarded their costs in this action in the amount of $23.50.

Dated this 16th day of September, 1971.

/s/ Watt E. Prather
District Judge

APPENDIX VI

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

JOHN GEORGE MAHONEY AND MARGARET ROSE MAHONEY Plaintiffs, vs. STATE OF IDAHO, STATE TAX COMMISSION, Defendant.	)	Case No. 3666 AMENDED JUDGMENT

On the basis of the Amended Findings of Fact and Conclusions of Law made and entered this date in the above entitled action, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant, State of Idaho, State Tax Commission, its agents and employees, is permanently enjoined from interfering with plaintiff Margaret Rose Mahoney's operation of a cigarette vending business upon Indian trust lands within the Coeur d'Alene Indian Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Margaret Rose Mahoney have judgment against defendant, State of Idaho, State Tax Commission, for the principal sum of $1,-

484.15, interest thereon in the amount of $260.00, and costs in the amount of $23.50.

IT IS FURTHER ORDERED that the cash deposit made by plaintiffs' attorneys with the Clerk of this Court in lieu of bond, in the amount of $548.80, be refunded to plaintiffs' attorneys.

Dated this 9th day of September, 1971.

/s/ Watt E. Prather
District Judge

APPENDIX VII

4 U.S.C. Sections 105-110

§105

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

§106

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

§107

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch.

§108

The provisions of sections 105—110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

§109

Nothing in sections 105 and 106 of this title shall be

deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

§110

As used in sections 105—109 of this title—

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

APPENDIX VIII

15 U.S.C. Sections 375-378

§375

For the purposes of this chapter—

(1) The term "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

(2) The term "cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco.

(3) The term "distributor licensed by or located in such State" means—

(A) In the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail:

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

(4) The term "use", in addition to its ordinary meaning, means the consumption, storage, handling, or disposal of cigarettes.

(5) The term "tobacco tax administrator" means

the State official duly authorized to administer the cigarette tax law of a State.

(6) The term "State" includes the District of Columbia, Alaska, Hawaii, and the Commonwealth of Puerto Rico.

(7) The term "transfers for profit" means any transfer for profit or other disposition for profit, including any transfer or disposition by an agent to his principal in connection with which the agent receives anything of value.

§376

(a) Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes, to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such a sale or transfer and shipment, shall—

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or in-

voice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under sub-section (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

§377

Whoever violates any provision of this chapter shall be guilty of a misdemeanor and shall be fined not more than $1,000, or imprisoned not more than 6 months, or both.

§378

The United States district courts shall have jurisdiction to prevent and restrain violations of this chapter.

APPENDIX IX

RELEVANT IDAHO STATUTES

9-101. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of legal expressions.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.

4. The seals of all the courts of this state and of the United States.

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States.

6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference.

63-2501.—It is the intent and purpose of this act to levy a tax on all cigarettes sold, used, consumed, handl-

ed or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this act, that whenever any cigarettes are given away for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled or distributed in this state.

63-2502. —For the purpose of this act, unless otherwise required by the context:

(a). The word "wholesaler" means and includes every person who purchases, sells or distributes cigarettes to retailers for the purpose of resale;

(b). The word "retailer" means every person, other than a wholesaler, who purchases, sells, offers for sale, or distributes cigarettes, irrespective of quantity or amount, or the number of sales.

(c). The words "retail selling price" mean the ordinary, customary price paid by the consumer for each package of cigarettes, before the tax levied by this act has been paid.

(d). The word "cigarette" means any roll for smoking, made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any other material, except where such wrapper is wholly or in the greater part made of tobacco.

63-2503.—From and after the first day of July, 1947, there is hereby levied, and there shall be collected

as hereinafter provided, a tax upon the retail sale of cigarettes, to an amount equal to three-twentieths of one cent for each cigarette.

62-2503.—There is hereby levied, and there shall be collected as hereinafter provided, a tax upon the retail sale of cigarettes, to an amount calculated as follows: (1) seven-twentieths (7/20) of one cent (1c) for each cigarette, the proceeds of which shall be deposited directly to the credit of the general fund; (2) to which shall be added one-twentieth (1/20) of one cent (1c) for each cigarette, the proceeds of which shall be deposited directly to the credit of the permanent building fund created in section 57-1108, Idaho Code; and, (3) to which shall be added one-twentieth (1/20) of one cent (1c) for each cigarette, the proceeds of which shall be deposited directly to the credit of the water pollution control fund. The total tax shall be nine-twentieths (9/20) of one cent (1c) for each cigarette. *(as amended)*

63-2504. —The tax on cigarettes, herein levied, is to be collected by the purchase of stamps, or the privilege of using a meter stamping machine, from the tax commission. The tax commission shall be the official agent of the state for the administration and enforcement of this act.

63-2505. —Any person offering for sale or selling cigarettes shall apply and obtain from the tax commission, upon the payment of one dollar, a registration certificate. Said registration certificate shall be personal and nontransferable, and shall be valid as long as the taxpayer shall continue in business. In case business is

transacted at two or more places by one taxpayer, a separate registration certificate for each place of business shall be required, but for such additional certificate no fee shall be required. Each certificate shall be numbered and shall show the name, residence and character of business of the taxpayer, and shall be posted in a conspicuous place at the place of business for which it is issued. When a place of business is changed, the taxpayer must return his certificate, and receive a new certificate for the new place of business free of charge.

63-2506. —Every person who sells cigarettes by means of a vending machine of any kind or character shall be required before engaging in such business, to obtain a certificate to engage in business as a retailer of cigarettes, and obtain a separate certificate for each machine used, and each machine so used shall be considered a separate place of business.

63-2507. —The tax commission is hereby authorized and required to design and have printed, stamps of a size and denomination to be affixed to each individual package, or to permit the use of meter stamping machines for imprinting stamps in lieu of separate stamps to be affixed. In the case of cigarettes the stamps shall be affixed on each individual package and also in such a manner that the stamps cannot be removed from the package without the stamp being mutilated or destroyed.

63-2508. —Every wholesaler, upon the receipt of cigarettes taxed herein, shall cause such to have the requisite denomination and amount of stamps affixed.

Every retailer, upon receipt of cigarettes not having the proper affixing of stamps, or stamped by a meter stamping machine, by a wholesaler, shall stamp or affix stamps immediately on each individual package or container. Provided, that any wholesaler or retailer engaged in interstate business, who shall furnish surety bond in a sum satisfactory to the commissioner of finance, shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business without affixing the stamps required by this act. Every wholesaler, at the time of shipping or delivering the cigarettes taxed herein, shall make a duplicate invoice, showing complete details of the sale, and shall retain the duplicate subject to the inspection by the tax commission or its agent.

SUPREME COURT, U. S.
DEC 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-386

STATE OF IDAHO, STATE TAX COMMISSION,
Petitioner,

vs.

MARGARET ROSE MAHONEY, *Respondent.*

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BRIEF FOR RESPONDENT IN OPPOSITION

JERROLD E. PARK
McFadden & Park
St. Maries, Idaho 83861

ROBERT D. DELLWO
Dellwo, Rudolf & Schroeder
1016 Old National Bank Building
Spokane, Washington 99201
Attorneys for Respondent

C.W. HILL PRINTERS

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Dellwo, Rudolf & Schroeder
1016 Old National Bank Building
Spokane, Washington 99201
Attorneys for Respondent